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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1918~~ 118

BETTY J. WORRELL,
Petitioner

v.

GEORGE W. MATTERS ET AL.,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, RESPONDENTS, IN OPPOSITION

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BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, RESPONDENT, IN OPPOSITION

OPINIONS BELOW

The opinions of the Pennsylvania Supreme Court are reported at 424 Pa. 202 and 226 A. 2d 53.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Was the Supreme Court of Pennsylvania correct in holding that the statute (requiring public school districts which provide school bus transportation to public school children to make such transportation available to nonpublic school children along established public school bus routes) does not violate the disestablishment clause of the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment to the said Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution of the United States and the Pennsylvania statutes involved are set forth in the Petition at pp. 3, 4.

STATEMENT OF THE CASE

The Commonwealth, respondent, agrees with the statement made by the petitioner in her Petition for a Writ of Certiorari.

ARGUMENT

1. The Federal Question Has Been Adjudicated

The constitutional issue asserted by petitioner has been conclusively adjudicated and determined by this Honorable Court in *Everson v. Board of Education*, 330 U.S. 1 (1947). That decision squarely held that a statute such as that here challenged did not violate the disestablishment clause of the First Amendment.

Petitioner seeks a review and reversal of the *Everson* decision because as she claims "this area of the law is clouded with doubt and confusion."[1] A referral to the cases decided by your Honorable Court wherein reference is made to the doctrine of *Everson* clearly demonstrates the error of this statement. In every such case your Honorable Court reaffirmed and reemphasized the legal principle therein enunciated clearly and without equivocation.

[1] The implications of the disestablishment clause have been intensively explored in the following decisions which are universally regarded and accepted as clear and free from doubt: *Everson v. Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Petitioner seeks to dilute the effect and authority of the *Everson* decision, supra, on the ground that it was rendered twenty years ago and by a vote of five to four. But if the fact of the passage of twenty years since its issuance may be said to qualify the authority of a decision by this Court, then the authority of every decision which it handed down prior to 1947 would be in jeopardy. It is scarcely necessary, moreover, to argue here that a decision by a divided court nevertheless carries the full weight of that court's authority.

Petitioner states that this Court, since handing down its decision in the *Everson* case, has considered a number of other cases "which have cast some question upon its validity." But petitioner fails to cite a single such case. In actual fact this Court, in its decisions subsequent to the *Everson* case, has in no way given indication that its ruling therein is now to be regarded as qualified or subject to doubt; rather, it has provided specific recognition of that holding.

In *McGowan v. Maryland,* 366 U.S. 420 (1961), the appellants who had been convicted of violation of the Maryland Sunday closing laws, contended that such laws violated the disestablishment clause. This Honorable Court, per Warren, C. J., speaking for six Justices (Warren, Black, Clark, Brennan, Whittaker and Steward) relied upon *Everson* in answer as follows:

> "Under challenge was a statute authorizing repayment to parents of their children's transportation expenses to public and Catholic schools. The Court, speaking through Mr. Justice Black, recognized that 'it is undoubtedly true that children are helped to get to church schools', and '[t]here is even a possibility

that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State' Id. 330 U.S. at 17. But the Court found that the purpose and effect of the statute in question was general 'public welfare legislation,' id. 330 U.S. at 16; that it was to protect all school children from the 'very real hazards of traffic,' id. 330 U.S. at 17; that the expenditure of public funds for school transportation, to religious schools or to any others was like the expenditure of public funds to provide policemen to safeguard these same children or to provide 'such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks,' id. 330 U.S. at 17, 18."

Id. at 443.

In a separate concurring opinion in which he was joined by Mr. Justice Harlan, Justice Frankfurter likewise acknowledged the authority of the doctrine of the *Everson* case, stating that:

". . . once it is determined that a challenged statute is supportable as implementing other substantial interests than the promoting of religious belief, the guarantee prohibiting religious 'establishment' is satisfied."

Id. at 466.

He then noted that unless the end achieved by a statute were promotion of religious doctrine or support of a

church, the statute was not violative of the disestablishment clause even though it might cause some children to go to nonpublic schools:

> "However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, Pierce v. Society of Sisters, 268 U.S. 510, 60 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468, that this Court held in the Everson case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment', even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone."
>
> *Id.* at 467.

Justice Frankfurter, who had dissented in *Everson*, thus expressed his full recognition of its validity and acceptance of its authority.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), involving Bible-reading in the public schools, this Court summed up its prior decisions on the religion clauses of the First Amendment as bespeaking a policy of "wholesome neutrality". Mr. Justice Clark, speaking on behalf of eight members of the Court pointed out that there are situations in which a tension between demands of free exercise and disestablishment may exist.

As the Court put it, "the two clauses may overlap". In 1947, in the *Everson* case, the Court had dealt with a significant example of such overlap in the question of public busing of parochial school children. As recently as 1963 the Court explicitly reinforced the doctrine it had stated in 1947:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, 300 U.S. 1 . . ."
>
> *Abington Township School District v. Schempp*, 374 U.S. 203, 222.[2]

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court again reiterated the doctrine of the *Everson* case. It held that South Carolina might not constitutionally apply the eligibility provisions of her unemployment compensation statute so as to compel a Seventh Day Adventist worker "to abandon his religious convictions respecting the day of rest" (by denying him state benefits though he refused to be employed on Saturdays). The Court based its decision squarely upon *Everson:*

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[2] Separate additional affirmation of the authority of the *Everson* holding was provided by Stewart, J.: "On the other hand, the Court has upheld against such challenge * * * a law authorizing reimbursement from public funds for the transportation of parochial school pupils. *Everson v. Board of Education*, 330 U.S. 1 * * *" 374 U.S. 203, 311.

> "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. Everson v. Board of Education, 330 U.S. 1 . . ."
>
> 374 U.S. 398, 410.

It is evident from a reading of the remaining comment of petitioner upon the *Everson* decision, that, far from finding the area of law which it covers "clouded with doubt and confusion", petitioner finds that decision all too clear and thus urges this Court to overrule itself.

It is significant that the two justices of the Supreme Court of Pennsylvania who dissented in the instant case based their dissent upon the Pennsylvania Constitution and expressly recognized the validity of the statute in question under the Constitution of the United States, as interpreted by this Honorable Court in *Everson.* As Bell, C. J., one of the dissenters, stated:

> "So far as the 'Establishment Clause' is concerned, I believe the present cases are ruled by the leading case of Everson v. Board of Education, 330 U.S., supra, where the facts and issues are strikingly similar."
>
> *Rhoades et al. v. School District of Abington Township,* 424 Pa. 202, 240 (1967).

This Court has recently reviewed the single constitutional issue herein involved and ruled adversely to petitioner's contentions. In 1961 a decision by the Connecticut

Supreme Court of Errors, upholding the constitutionality of a Connecticut statute providing transportation at public expense for nonpublic school children,[3] was appealed to this Honorable Court which dismissed the appeal for want of a substantial federal question.[4]

---

2. Petitioner Raises No New Question

Petitioner raises no issues which were not fully considered by this Court and ruled upon in its decision in the *Everson* case. A considerable portion of her argument is devoted to purely *legislative* questions—matters resolved by the General Assembly of the Commonwealth of Pennsylvania in the proper exercise of its discretion and which the Supreme Court of that state properly abstained from considering. For example, petitioner argues that the statute in question does not in fact promote the safety of children (See Petition, pp. 11-15). It is submitted that petitioner's speculations as to practical effectiveness of the legislation, its wisdom or lack of it, or with respect to other purely legislative issues, present no substantial question for this Court to decide.

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[3] Snyder v. Newton, 147 Conn. 374 (1961).
[4] 365 U.S. 299 (1961).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
EDWARD FRIEDMAN,
Counsel General,
JOHN P. MCCORD,
Deputy Attorney General,
WILLIAM C. SENNETT,
Attorney General,
Attorneys for Commonwealth of Pennsylvania, Intervenor.

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BRIEF OF PAUL A. GRUBB, LINDA GRUBB, DONALD MANZ, ANNA MANZ, JOHN QUINDLEN, and CATHERINE QUINDLEN, RESPONDENTS, IN OPPOSITION

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Case Caption

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STATEMENT OF THE CASE

The Commonwealth, respondent, agrees with the statement made by the petitioner in her Petition for a Writ of Certiorari.

ARGUMENT

Respondents Paul A. Grubb, et al., join in the Brief of the Commonwealth of Pennsylvania, Respondent, in Opposition, filed heretofore in this proceeding.

CONCLUSION

For the reasons stated it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

D. BARRY GIBBONS,

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Attorneys for Intervenors